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IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 18-0607

IN RE THE ESTATE OF EDWARD M. BOLAND,

Deceased,

PAUL BOLAND and MARY GETTEL,
As Heirs of the Estate of Dixie L. Boland,

Petitioners and Appellants,

v.

CHRIS BOLAND, BARRY BOLAND, ED BOLAND CONSTRUCTION, INC., and NORTH PARK INVESTMENTS, LLC,

Respondents and Appellees,

APPELLANTS' PETITION FOR REHEARING AND RECONSIDERATION

Petitioners/Appellants, Paul Boland and Mary Gettel, (hereinafter "Appellants" or "Paul") petition the Court to reconsider its decision of October 1, 2019.

The **grounds:**

The Decision overlooked facts material to the Decision, namely,

(1) discovery was on going and Appellant's Motion to Compel was outstanding when the District Court denied Paul's Petition, and

(2) documents that show the Decedent was owed $277,617.13 at the time of his death.

(3) The Decision conflicts with a statue and controlling decisions that were not addressed by the Court, namely, §3-1-805, and *In re Guardianship of A.M.M.*

(4) Other grounds that meet the requirements of Rule 20(1)(a) of the Rules of Appellate Procedure.

ARGUMENT

I.
The Decision Overlooks the Fact That Discovery on the Issue this Court Said was Unsupported was Ongoing at the Time.

At the time of the District Court's decision, discovery was underway on the very issue this Court ruled was unsupported. Paul's Motion for an Order Compelling Discovery was filed on January 18, 2018. (See App. 15 at 97-113.) At the time the Court entered its Order on March 13, 2018, this Motion and Appellees' (hereinafter "Chris") Motion for a Protective Order on the same matter had been fully briefed but not yet decided. See also Combined Brief (App. 36 at 303-321) filed 5 days before the Court's Order. This brief explained in detail Paul's claims and the need for more

discovery; it contained 25 exhibits with 83 pages all of which directly responded to Chris's contentions.

Once a turnover petition is filed in a contested probate, it should be treated as a complaint, i.e., a new lawsuit. Once any legal motions are resolved, a scheduling order including a hearing date should be issued by the Court. Expecting that procedure would be followed here, counsel treated Chris's Response as a motion to dismiss on legal grounds; he responded to the legal issues, and stated the discussion of the facts should await a completion of discovery. (App. 27 at 225, 228.) A discussion of the facts would not be appropriate until a Motion for Summary Judgment had been filed.

This Court's Decision rejects this whole approach to Turnover Orders and establishes a new procedure in Montana Probate. (Decision at 12-14.) By authorizing a ruling before discovery is completed, this Court has denied Appellants and all future claimants due process of law.

The United States Supreme Court says discovery matters affect due process under the Constitution. *Wardius v. Oregon*, 412 US 470, 474-75 (1973). This Court has set forth the test of due process:

> The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."

Geil v. Missoula Irrigation District, 2002 MT 269, ¶61, 312 Mont. 320, ¶61, 59 P.3d 398, ¶61. See other cases cited therein. Deciding the case before discovery is completed, particularly when a motion to compel is still outstanding, is inconsistent with an opportunity to be heard in a meaningful manner. This is particularly true when counsel requested a hearing and fully expected a scheduling conference. The law was changed without notice to Paul; Paul was deprived of an opportunity to present his case on the facts.

Even the case cited by in the Decision, *In re the Marriage of Sampley*, specifically states that the ruling is limited to cases in which **"there is no dispute of material fact**." (Emphasis supplied.) *In re Marriage of Sampley*, 2015 MT 121, ¶9, 379 Mont. 131 ¶9, 347 P.3d 1281, ¶9.[1] To say there are no material facts at issue when discovery is still ongoing is clearly the denial of an opportunity to be heard in a meaningful manner. See *Geil*, 2002 MT 269 at ¶61.

II.

This Court Overlooked, or Ignored, Evidence that was on the Record and in Appellants' Brief.

In its Decision this Court states that Paul had ample opportunity to provide evidence and failed to do so (¶¶27, 28, 28, & 29), and have not raised any error respecting the Petition other than the Court's failure to hold a hearing (¶38). This is

[1] This case is also inapplicable because the issue before the Court was substantive jurisdiction and the claimant was still free to go to the proper jurisdiction and seek the same relief. *Sampley,* 379 Mont. at 136, ¶ 14. (Reply Brief at 13)

simply not true. Paul requested 9 separate indebtedness in his initial Petition (App. 5 at 29-30). He outlined one of those items in significant detail in his Opening Brief at 8-10. See also extensive review of all of these debts set forth in Paul's Combined Brief (App. 36 at 304-321) and Motion for Partial Summary Judgment (App. 16 at 114-123) all of which were available to the District Court at the time of its decision below.

Paul did have sufficient evidence to seek Summary Judgment in his favor on one of these 9 debts. Chris did produce Ed Boland Construction, Inc.'s income tax returns and a Quicken report of all Dividends the Decedent ("Ed") received from that corporation between 2007 and 2014. By subtracting the dividends Ed received of $568,820.00 from Ed's share of the income from the corporate K-1's of $846,438.00, there is a shortage of $277,617.13. (Opening Brief at 8.) That is income Ed had to pay income taxes on; it was never paid to Ed.

Chris has no credible response; he says it was paid and cites payment made by another entity, North Park Investments, LLC. The District Court, in an obvious error, says in its Order Denying Paul's Petition, "Ed received $230,000 payment from the corporation." (Order at 4, App. 1 at 4). First, it's the wrong amount. Second it did not come from "the corporation." It came from the LLC which also owed money to Ed. At least without some further explanation—there is none in the record—payment by the LLC cannot be used to satisfy the payment of a corporation's

dividends. Therefore, the District Court's decision is clearly erroneous. Paul called for a Hearing so Chris would have a chance to present its evidence to the contrary. There is no such evidence in the record. The Decision denies Appellants of $277,613 which is a denial of due process of law under the Federal and State Constitutions.

Chris may respond that the LLC paid the debt on behalf of the corporation or that the corporation is not obligated to pay a dividend. First, such an explanation is not in the record on appeal. Second, there is no evidence it was accepted or agreed to by Ed. Third, Ed had to pay taxes on it if it was on his K-1's from the corporation. Fourth, it is contrary to their dividend policy which is in the record.[2] Fifth, it may be a violation of the agreement on value of the corporation.[3] Fourth, it is in the wrong amount—$230,000 is $47,617.13 short. Fifth, the evidence shows that the dividends stopped when Ed became terminally ill.[4] Sixth, there are substantially debts owed by the LLC to Ed. But even if Chris could successfully rebut any of these arguments, it proves that there are material issues of fact that needs to be resolved in a Hearing.

Failure to provide a hearing giving Appellants an opportunity to present these documents and facts is to deny Appellants "the opportunity to be heard ... in a

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[2] Statement of Dividends in App. 16 at 126-130. It is apparent Ed drew on his dividend account ("checks") whenever he needed cash. This is supported by testimony.

[3] The Shareholders' Agreement (attached to Chris's Opposition to Petition) set a price on the stock. Changing the dividend policy without consent of all parties would violate the Agreement.

[4] The log of dividends shows the last payment was made on May 1, 2014, about the time Ed became terminally ill. (App. 16 at 126.)

meaningful manner." See *Geil supra.* at ¶61 and cases cited therein. It is a denial of due process.

The Decision is wrong to say Appellants have produced nothing that contradicts the evidence produced by Chris (¶29), the appeal is not about the substance of the Court's Order on the Petition (¶61), or that the pleading was "frivolous and lacked any possibility of evidentiary support" (¶50), or that "Towe and Paul have not raised any error respecting the Petition, other than the Court's failure to hold a hearing." (¶38). A claim of $277,617.13 based on hard evidence, tax returns, is not a small matter. It, and not the sanctions issues, is the center point of this appeal. At the very least, the District Court should have notified Paul and his counsel that he planned to make a decision without a hearing and given Paul an opportunity to supplement the record.

If a Judge dismissed a non-probate complaint on the facts while discovery was in progress on the grounds that the facts are "straight forward" and that Plaintiff is not entitled to prevail would be unthinkable in view of the due process clause, why wouldn't the same thing apply to a contested issue in probate.[5] Montana has a long history of treating contested issues in probate the same as civil cases with a right to jury trial. *Estate of Cradock,* 166 Mont. 68, 530 P.2d 483 (1975). This is reinforced

[5] In fact, that actually happened here. Paul filed a case in District Court independent from the Probate and after he filed a Motion for Partial Summary Judgment in his favor, Judge Pinski sua sponte consolidated the case with the Probate Petition. So Paul is out that complaint as well.

in the Uniform Probate Code. *Estate of Chaney,* 439 N.W. 2d 764, 774 (Neb. 1989)(Any disputed probate issue requires a notice and a hearing).

As the official docket register shows, not only was Paul's counsel and the Court becoming overwhelmed with outstanding issues raised by Chris, but soon after, Appellants were no longer able to afford counsel to represent them on other cases. Thus, the parties in this case with the deepest pockets have been prevailing. Appellants insist that it is Chris and the Appellees who have taken advantage of the system and prevented justice to all parties

II.

The Decision Conflicts with §3-1-805, M.C.A. and the Controlling Decision in *In re Guardianship of A.M.M.* A Hearing on Bias or Prejudice Should Not have Proceeded Without an Affidavit.

The authorization for a hearing on bias or prejudice of a Judge is set forth in the statute. Section 3-1-805(1), M.C.A. specifically provides that a judge shall proceed no further in the case whenever a party "file[s] an affidavit" alleging facts showing personal bias or prejudice. The statute then goes on to provide the procedure that must be followed. This is the exact procedure that Judge Pinski adopted in the instant case with the obvious result that this complex case with a large number of outstanding issues briefed and ready for decision was stopped for at least 6 months (not counting this appeal).

The case law is also clear. The affidavit must be filed and if it is not or is not in proper form there should be no hearing. *In the Matter of the Guardianship A.M.M.*, 216 MT 213, ¶21, 384 Mont. 413, ¶21, 380 P.3d 736, ¶21.

In this case no such affidavit was filed. The Decision states that the District Court did not err in proceeding without such an affidavit (Decision, ¶41.) The proceeding under §3-1-805(1) was not "just about to be commenced" but **did commence** when the District Court dropped all proceedings and set a hearing on bias and prejudice. As a result the Court lost 6 months in a case that needed quick and prompt attention. This hurt Paul more than it hurt Chris. It is respectfully submitted that this action was contrary to the statute, contrary to the case law, and contrary to the effective operation of the judicial procedure. In the absence of an affidavit or a petition or motion to disqualify, the Court should not have stopped this case and should not have proceeded under §3-1-805(1).

IV.

OTHER GROUNDS FOR REHEARING

There are other grounds for requesting a rehearing that meet the requirements of Rule 20(1)(a) of the Rules, but word limitations will not allow review in this document. See Brief references in Appellants' Petition for En Banc Hearing and Consideration.

Appellants and their counsel are particularly concerned about the conclusion in the Decision that this appeal was frivolous and, therefore, the Court was entitled to impose sanctions for the appeal. (Decision at 30.) As set forth above, Appellants and their counsel strongly believe due process has been denied when the District Court issued its Order Denying Appellants' Petition while discovery was still outstanding and when documents before the Court conclusively prove that at least $277,617.13 is owed based on the tax returns. Appellants do not understand how that claim can be frivolous. Also, this Court concludes that Appellants' actions were presented for improper purposes (Decision at 25, 27, and 20). Nothing can be further from the truth. In view of the very clear language in *Draggin' Y Cattle Co., Inc. v. Addink*, 2016 MT 98, ¶¶23-29, 383 Mont. 243, ¶¶23-29, 371 P.3d 970, ¶23-29, Appellants thought it was appropriate to ask a judge if he had any reasons for disqualification.

Paul and his counsel acknowledge that this Court has now decided under the facts of this case that a question that even implies bias or prejudice should never be raised unless one is prepared to file an affidavit and motion for disqualification under Rule 2.3. At the time it was made, however, this was not obvious and apparent. Appellants and their counsel believe it is totally unfair for the Court to expand its previous rulings to cover the facts situation and then sanction counsel and client for failing to abide by that new ruling. Certainly there was no intent to manipulate the Court or present a question for improper purposes or to engage in wasteful conduct or

abusive litigation.[6] The delay of the case because the District Court stopped all proceedings pursuant to §3-1-805(1), M.C.A., without an affidavit hurt the Appellants far more than the Appellees.

Also, Paul and his counsel wish to point out that they did make a "full and unequivocal apology" at the beginning (App. 7 at 44)(App. 25 at 219) which the Judge did not accept and again on August 31, 2018 (App. 24, 210) which the Judge did accept in open Court on September 6, 2018 (See transcript at 31).

Respectfully submitted this 16th day of October, 2019.

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By: Thomas E. Towe
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 20(3) of the Montana Rules of Appellate Procedure, I certify that the foregoing ***Appellants' Petition for Rehearing and Reconsideration*** is printed with a proportionately spaced Times New Roman text typeface of 14

[6] The Court's reference to other litigation (Decision at 62) are cases which were commenced before any of the sanction issues were raised and in which on appeal the Appellants were forced to appear without counsel because they simply did not have the funds to engage proper counsel. It is unfair to bring in these cases in which Towe was not involved to support the award of attorney's fees and costs on appeal.

points; is double-spaced, and the word count calculated by Microsoft Word, is 2497, excluding the Exclusions set forth in Rule 11(4)(d) thereof.

DATED this 16th day of October, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered to the following counsel of record, served by e-service and/or U.S. mail, postage-prepaid, upon:

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Dated this 16th day of October, 2019.

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By Thomas E. Towe

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I, Thomas E. Towe, hereby certify that I have served true and accurate copies of the foregoing Petition - Rehearing to the following on 10-16-2019:

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